

The State of the DBE Program: A Legal Perspective

Virginia DBE Transportation Symposium

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Topics

- Recent litigation developments
- 2014 Part 26 Changes
- Small Business Elements
- Veteran Business Programs
- Title VI Complaints
- DBE Fraud Prosecutions
- Additional Trends
- Disparity Studies

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AGC of San Diego v. CalTrans

- CalTrans Disparity Study
 - Found insufficient disparities for Hispanics & Subcontinent Asians
 - Recommended a DBE goal of 13.5%, 6.75% to be met through contract goals
- USDOT approved dropping Hispanic & Subcontinent Asian males from goal credit
- DBE group & San Diego NAACP intervened
- Caltrans conducted a study “update” that found dropping Hispanic & Subcontinent Asian males lead to disparities in their utilization

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AGC of San Diego v. CalTrans, cont.

- Summary judgment in CalTrans favor
 - AGC did not have associational standing because it did not identify individual members harmed by the program
 - Statistical & anecdotal evidence of discrimination in the California transportation industry was sufficient
 - No need to show specific acts of deliberate discrimination
 - No need to show underutilization in every industry category; the test is a pervasive, discriminatory system
 - No requirement to verify anecdotes
 - No requirement for separate goals by industry category
 - CalTrans applies many race-neutral measures

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Mountain West Holding Co. v. Montana DOT

- Summary judgment in MTDOT's favor
 - MTDOT's disparity study found underutilization of DBEs for all groups in most categories & anecdotal evidence of continuing discrimination
 - Study recommended only race-neutral measures to meet 5.83% goal; utilization then dropped from 13.1% to 2.8%
 - USDOT recipient does not have to independently establish its compelling interest
 - Drop in participation is relevant & probative
 - No requirement to distinguish between industries
 - Plaintiff cannot simply dispute the methodology & finding; it must show that the data are invalid

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M.K. Weeden Construction. v. Montana DOT

- Plaintiff failed to meet 2% DBE contract goal
- Summary judgment for agency
 - Plaintiff failed to make good faith efforts
 - Other bidders met the goal
 - Failure to make good faith efforts = non-responsiveness
 - Obtained 6 MTDOT contracts over 6 years, so no irreparable harm
 - No standing because plaintiff wasn't subjected to race-based barrier to its ability to compete for prime contracts

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Dunnet Bay v. Illinois DOT

- Narrow tailoring case
- Low bidder failed to meet 20% DBE goal
- Made some but not all possible good faith efforts
- Did IDOT adopt a “no waivers” policy?
- Holding
 - IDOT’s goal setting method was reasonable
 - There was no “no waiver” policy
 - Plaintiff failed to make good faith efforts
 - Poor documentation of results; didn’t contact IDOT for help; other bidders met the goal

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Geyer Signal, Inc. v. Minnesota DOT

- DBE program is facially constitutional (again)
 - Program can be operated without “overconcentration”
 - Several approaches to address the problem
- MnDOT’s program is narrowly tailored
 - Plaintiff failed to prove that “better data” were available; that MnDOT was “unreasonable” in relying on existing data; or that discrimination no longer exists
 - Rejected challenge to methodology to set contract goals
 - Overconcentration analysis based on NAICS codes was reasonable

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Midwest Fence v. Illinois DOT & Illinois Tollway

- Summary judgment for both agencies & USDOT
 - Controlling case law upheld IDOT’s DBE Program in 2007
 - Inadequate recent disparity study for the Tollway so counsel relied on a 2006 availability study; new disparity study recently completed
 - IDOT correctly applied Part 26
 - Tollway’s program largely mirrors Part 26
 - Plaintiff has ample opportunities on contracts

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2014 DBE Rules Changes

- Economic disadvantage
 - New “ability to accumulate substantial wealth” test
 - What does it mean (“void for vagueness”)? Will agencies use this?
- Control
 - Former non-DBE owner who remains involved in the business is presumed to remain in control
 - May impact minorities’ & women’s ability to buy into existing firms
 - Impact on capacity & scale?

2014 DBE Rules Changes, cont.

- Prequalification requirements
 - Certification must be disconnected from prequalification
 - Does it matter without changes in prequal standards?
- NAICS codes
 - What about multiple codes?
- Time for DBE solicitation
 - What does “practicable” mean?
 - Should the recipient set a timeframe?

2014 DBE Rules Changes, cont.

- Compliance as a matter of responsiveness or responsibility
 - 5 day limit to submit compliance information effective 1/1/2017
 - Doesn’t apply to design/build contracts
 - Plenty of time to bid shop
 - Longer is problematic for recipients so what does this change?
 - Suggestion: COB of bid day

2014 DBE Rules Changes, cont.

- Role of price in evaluating good faith efforts
 - No quantitative formulas BUT
 - Can't reject only because of price UNLESS "unreasonable"
 - Who eats increased costs of substitutions? Litigation risk?
 - Performance of other bidders in meeting the goal = self-fulfilling standard?

2014 DBE Rules Changes, cont.

- Counting race-neutral participation
 - Deletes reference to "strict low bid system"
 - Utilization in excess of the contract goal?
 - Contract goal as the cause of utilization
 - Goal setting is not a science & conditions change during performance
 - Effect on the projection of future race-neutral participation

Small Business Elements

- No need for disparity studies because size is not a protected classification
- Inadequate to remove systemic race & gender barriers because the vast majority of firms are small
- BUT only remedies to increase access to prime contract opportunities
- Imposing the personal net worth test for SB certification is highly advised

Small Business Elements, cont.

- DBE Program must include small business element (49 C.F.R. § 26.39)
- Possible strategies
 - **Race-neutral small business set-asides or points**
 - Unbundling
 - On contracts without goals, mandated subcontracting
 - Fostering small business joint ventures
 - Disfavored: SBE contract goals added to DBE contract goals

Veteran Business Programs

- Increased development of Veteran-Owned Small Business & Service Disabled Veteran-Owned Small Business programs
 - Lower legal standard of “rational basis” review
 - DBE program does not include veterans component
 - Federal goal is 3% for SDVOSBs; Veterans Administration’s goal is 7% for SDVOSBs
 - Major problems with self-certification, pass throughs & ownership & control
 - Data that there is a problem? Remedy or service benefit? Effect on DBE programs?

LGBT Programs

- Increased interest from lawmakers
- Lower legal standard of “intermediate scrutiny” for gender discrimination?
- Beneficiaries are White males
- No data available
 - Census will begin asking about sexual orientation in next census
- Certify under the individual approach of Part 26
- Collect contract data?

Title VI Complaints

- Bay Area Rapid Transit
 - Failed to conduct an equity analysis
 - When ordered to do so, product was inadequate
 - FTA directed \$70M to other uses to serve low income communities & minorities
- California High Speed Rail Authority
 - DBE coalition filed complaint about extremely low DBE utilization to date & no formal DBE program
 - Part of resolution was to conduct a disparity study

Additional Trends

- Defendants named in their individual capacities
 - Legal standard: does the conduct “violate clearly established statutory or constitutional rights of which a reasonable person would have known”
 - No indemnification & payment of defense costs
- DBEs intervening in cases
 - Objectives
 - Full access to information & input into strategy & tactics
 - Ability to submit evidence
 - Impact
 - Critical role in defending Chicago’s M/WBE construction program
 - Presented alternative study methodology in *Caltrans* case

Additional Trends, cont.

- Increased scrutiny under narrow tailoring
 - DBE contract goal setting
 - Can you explain how the number was derived?
 - Must be based on the scopes of work of the contract, including the prime dollars, & availability in those scopes
 - Is the process described & the determination documented?
 - Apply a step 2 “but for” adjustment to overall DBE goal?
 - No case has upheld this approach, but it has not been directly challenged
 - How can the adjusted goal be less than step 1?
 - What data to use?

Additional Trends, cont.

- Good faith efforts reviews
 - Standards must be detailed
 - How much notice to give DBEs?
 - How many &/or what percentage must be contacted?
 - What is the role of price?
 - Waiver request procedures must be clear & easily accessible
 - Suggest using forms & checklists
 - Allow sufficient time for consideration
 - When are requests due?

Additional Trends, Cont'd

- Overconcentration
 - Defined in Part 26 as DBEs are so heavily represented in a given type of work that non-DBEs are squeezed out
 - If the recipient finds overconcentration, it should take mitigating measures
 - This issue has been raised in some lawsuits
 - Recipients should pay attention
 - What response to overconcentration finding?
 - Drop NAICS code for goal credit?
 - What about overconcentration of non-DBEs?

Additional Trends, Cont'd

- Commercially Useful Functions Issues
 - Role of joint venture partners
 - Confusion about counting fee & conditions of the JV prime contractor
 - Example: 25% DBE JV; \$100M contract; JV subs 80%; DBE JV partner performs \$20M subcontract. Total credit: \$25M/25%
 - Installation only subcontracts
 - Use of prime's equipment
 - Common employees ("payroll jumping")
 - How much help is too much help? Title VI issues?

Prosecutions for D/M/WBE Fraud

- From 2009-2013, USDOJ collected \$7.5B in claims
- City of Chicago Cases
 - Multi-year scheme involving DBE front/pass through at O'Hare
 - \$11M trash hauling contract involving M/WBE pass throughs
 - \$14M settlement of commercially useful function cases with 3 year court appointed monitor
- PennDOT: 15 year scheme; over \$136M in contracts; convictions on 26 of 30 counts; passthrough using fake business cards, emails, decals, invoices, etc.
- Port Authority of NY & NJ: pending criminal charges involving a MBE joint venture

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Prosecutions for D/M/WBE Fraud, cont.

- NYC: \$10M settlement against contractor who self-performed work
- Minneapolis: \$4.6M settlement for DBE passthroughs
- Connecticut: \$2.4M settlement for DBE passthroughs
- Idaho: 2 years in jail & \$3M settlement of certification fraud
- Utah: \$1M settlement of 8(a) joint venture's failure to perform a CUF
- Lessons
 - Conduct rigorous on-site monitoring & CUF reviews
 - Supply contracts & joint ventures are especially problematic

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Recommended Disparity Study Elements

- Determine utilization of DBEs as % of total dollars in the agency's geographic & product marketplaces
 - Use highest level of detail (6 digit NAICS, not "construction")
 - Do not set a ceiling (e.g., \$500K); set a floor (e.g., informal threshold)
 - **Fill in missing non-DBE subcontractor data**
 - Obtain large majority of contracts & contract dollars (e.g., 85%)

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Recommended Disparity Study Elements, cont.

- Determine DBE availability using the real “Custom Census” approach
 - Create database of relevant agency projects
 - Identify the geographic & product markets empirically
 - Count **all** businesses in relevant markets
 - Identify all DBEs in those markets
 - Do not determine availability by surveys
 - Do not adjust for “capacity”

Recommended Disparity Study Elements, cont.

- “Custom Census” benefits
 - Provides dollar-weighted availability estimates to set overall, annual DBE goals
 - Provides detailed availability estimates to set DBE contract goals
 - Casts a “broad net” as held by courts to meet the DBE program’s remedial purpose
 - Counts all businesses in relevant markets, not just those either known to the agency or responding to surveys

Recommended Disparity Study Elements, cont.

- Do not use the “Bidders List” Approach
 - Existing discrimination may lead to under-representation
 - Popularity of program may lead to over-representation
 - “Apples to oranges” if lists are combined
 - Separate prime & sub calculations are unrealistic, too simplistic & maintain barriers
 - **Remedial aspect of the Program is lost by looking only at current results without regard to the current effects of past & present discrimination**

Recommended Disparity Study Elements, cont.

- Do not conduct a “capacity” analysis
 - No common definition
 - Ignores the elasticity of supply & the effects of demand, especially in construction
 - What about subcontracts?
 - Disparities persist even when variables are controlled for
 - Variables (revenues, years in business, bonding limits, etc.) are impacted by discrimination
 - **Ignores the DBE program’s remedial nature by locking in the results of past discrimination**
 - “Capacity” argument rejected by courts when explained by expert testimony

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Recommended Disparity Study Elements, cont.

- Conduct an agency contracts disparity analysis only in 9th Circuit
 - A finding of no disparity isn’t the end of the analysis; consider:
 - Effects of the existing program
 - Continuing impact of discrimination
- Conduct an economy-wide disparity analysis
 - Look outside agency’s own contracting activities
 - DBEs’ vs. non-DBEs’ business formation rates & earnings from Census data sources
 - Critical element of legal defense for existing programs

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Recommended Disparity Study Elements, cont.

- Include anecdotal evidence
 - Necessary but not sufficient
 - Explore current effects of past biases & exclusion
 - Examine denials of full & fair access to government contracts & subcontracts
 - Evaluate existing programs for effectiveness in remedying discrimination & providing opportunities
 - **Critical avenue for DBEs’ participation**

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Recommended Disparity Study Elements, cont.

- Conduct a program review
 - Interview DBEs, primes & staff
- Evaluate the effectiveness of contract goals
- Evaluate the effectiveness of race-neutral measures
 - Utilization on no-goals contracts
 - Small business elements
 - Size standards & personal net worth criteria
 - Set-asides
 - Contract goals
 - Supportive services efforts
 - Business Development Program

Recommended Disparity Study RFP Design & Process

- Allow at least one year for study completion
- Evaluate cost factors
- Include legal counsel at all steps
- Use a general rather than a detailed scope of work
- Require a sample study
- Check references
- Conduct face-to-face interviews
- Don't add extraneous issues like employment

Recommended Disparity Study RFP Design & Process, cont.

- Study scope
 - Use 5 years of contract data, if possible
- Types of contracts
 - USDOT-funded
 - Locally-funded?
 - Informal?
 - Sole source?

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